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No. 88-1503

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

NANCY BETH CRUZAN, by her parents and co-guardians, LESTER L. and JOYCE CRUZAN, - - - - - - - - - - - - Petitioners,

versus

DIRECTOR OF MISSOURI DEPARTMENT OF HEALTH, and ADMINISTRATOR OF THE MISSOURI REHABILITATION CENTER AT MT. VERNON, - - - - - Respondents,

versus

THAD C. McCANSE, Guardian ad litem, - - - Respondent.

ON WRIT OF CERTIORARI TO THE MISSOURI SUPREME COURT

BRIEF OF THE VALUE OF LIFE COMMITTEE, INC., AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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October 16, 1989

QUESTION PRESENTED

Does the United States Constitution require a state to authorize court-appointed guardians to cause the death of their incompetent and dependent ward by denying her necessary food and fluids?

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INTEREST OF AMICUS

The Value of Life Committee, Inc., is a non-profit Massachusetts corporation organized in 1970 to affirm in the public domain the value of all human life from conception to natural death. The Committee is actively engaged in educational efforts relating to these issues, including both the collection and the dissemination of research and other information relevant to such issues. Its members include a broad spectrum of citizens from all walks of life, including numerous physicians.

As part of its educational effort, the Committee has sponsored public statements prepared by respected physicians. The President of the United States and other public figures have referred to these statements in addressing such questions as the humanity of the unborn, the ability of a fetus to feel pain, and the propriety of using fetal tissue in research.

Members of the board of governors of the Value of Life Committee have been actively involved in the care and treatment of incompetent persons, and in particular the provision of nutrition and hydration to such persons. Governing members have written on this subject and have directly participated in such court cases as *In re Jobes,* 108 N.J. 394, 529 A.2d 434 (1987), *Brophy v. New England Sinai Hospital, Inc.,* 398 Mass. 417, 497 N.E.2d 626 (1986), and *In re Hier,* 18 Mass. App. Ct. 200, 464 N.E.2d 959 (1984), each of which raised the issue of denying food and fluids to incompetent persons.

This *amicus curiae* brief is an extension of the educational efforts of the Committee. The Committee seeks through this brief to affirm the value of all human beings, and to assist the Court in applying fundamental constitutional principles to the case of Nancy Cruzan.

SUMMARY OF ARGUMENT

Petitioners' claim of a constitutional right to deny necessary food and fluids to their incompetent and dependent ward, Nancy Cruzan, is in complete disregard and derogation of Nancy Cruzan's genuine constitutional rights, as a human person, to life, liberty, and the equal protection of law. This Court must therefore reject petitioners' claim and affirm the judgment of the Supreme Court of Missouri.

Nancy Cruzan is a human being, and hence a person with constitutional rights. All human beings are ipso facto persons under the fourteenth amendment. This basic premise accords with the understanding of the framers of the fourteenth amendment, and reflects the fundamental principle that human life possesses unique, intrinsic value.

As a person, Nancy Cruzan retains the rights to life, liberty, and equal protection under the fourteenth amendment. Petitioners' claim of authority to secure Nancy Cruzan's death by starvation and dehydration conflicts with her basic constitutional rights, and must therefore fail.

Petitioners' claim conflicts with Nancy Cruzan's right to life because their claim is tantamount to a "right" to kill her. Petitioners' assertion of an unwritten "right to choose death" for their incompetent ward must fail in the face of the explicit contrary constitutional guarantee of a right to life. Furthermore, the petitioners' demand that

the state itself starve and dehydrate Nancy Cruzan, that the state violate its duty to provide adequate food to those for whom the state acts as caretaker, and that the state abandon its uniform and unqualified interest in human life in favor of sliding scale of "quality of life," all fly in the face of the prescriptions of the constitutional right to life.

Petitioners' claim conflicts with Nancy Cruzan's right to liberty because their claim is tantamount to a "right" to usurp her personal decisionmaking powers. Nancy Cruzan lacks the capacity to direct her own care. Hence, others must act for her, subject to an objective duty to safeguard her best interests. Petitioners, however, seek to arrogate to themselves the subjective, discretionary authority Nancy Cruzan would have if she were a competent, autonomous person. Assertion of such authority ignores the objective needs of incompetent persons and violates the strictly personal nature of decisional rights.

Petitioners' claim conflicts with Nancy Cruzan's right to equal protection because their claim is tantamount to a "right" to deny her food and fluids because of her mental disability. Petitioners object to the provision of necessary food and fluids to Nancy Cruzan precisely because this sustenance keeps her alive. Petitioners want Nancy Cruzan dead because they consider her "quality of life" so low as to be "meaningless." Equal protection, however, precludes a court from categorizing a class of human persons as "worthless." Nor may a court, consistent with the Constitution, confer its approval upon the lethally discriminatory actions of guardians by defining such discrimination as "reasonable." Finally, to grant guardians authority to make independent, essentially unreviewable decisions to omit basic care for their wards would be to expose all incompetent persons to abusive, invidiously discriminatory treatment.

This Court should uphold the genuine rights of Nancy Cruzan and reject the illegitimate claims of petitioners. This Court should affirm the judgment of the Supreme Court of Missouri.

ARGUMENT

Petitioners attempt to characterize this case as a struggle between the power of the state and the liberty of Nancy Cruzan and her family. This characterization, however, omits two crucial factors. First, Nancy Cruzan is unable to articulate her views, and thus cannot

automatically be aligned with petitioners, her guardian parents. As in the case of *Parham v. J.R.*, 442 U.S. 584 (1979), "the child's rights and the nature of the . . . decision"— in this case, whether to withhold necessary food and fluids — "are such that parents cannot always have absolute and unreviewable discretion to decide" what is to be done to their child, *id.* at 604. Second, depicting this case as a conflict between "state-ordered medical treatment," Brief for Petitioners at 16, and "an individual's right to self-determination," *id.* at 18, represents a seriously incomplete statement of the legal issues at stake. This case does not present that "happy choice, so rarely available," of expanding one liberty without diminishing any competing rights. *See Michael H. v. Gerald D.*, 109 S. Ct. 2333, 2345 (1989) (plurality opinion). Rather, this case touches upon a constellation of rights and interests not subject to simplistic reduction.

The central focus of this case must be Nancy Cruzan — her status as a person, her rights, and the responsibilities that her family and the state bear toward her.

Nancy Cruzan is a person, with constitutional rights to life, liberty, and equal protection. Petitioners' claim would sweep away these basic rights, and must therefore be rejected.

I. NANCY CRUZAN IS A PERSON WITH CONSTITUTIONAL RIGHTS UNDER THE FOURTEENTH AMENDMENT.

It is crucial at the outset to observe that Nancy Cruzan, the individual around whom this case revolves, is a person with constitutional rights under the fourteenth amendment. No party to this case has contested this fundamental proposition. [1] Nevertheless, in view of the recent challenge in certain circles to the notion that all human

[1] Although petitioners do not explicitiy deny that Nancy Cruzan is a person, they repeatedly employ dehumanizing terminology, referring to Nancy Cruzan as a "vegetable," Brief for Petitioners at 5, 15, 34, 35, a "biological shell," *id.* at 15, 38, living "an artificial existence," *id.* at 32, 35, lacking a "meaningful life," *id.* at 16, 39 n.24, and deriving "no benefit" from continued life, *id.* at 27.

Ironically, the claim of petitioners rests upon the assumption that Nancy Cruzan, as a *person,* has certain constitutional rights that include the power to refuse food and water necessary to sustain life. *See generally* Brief for Petitioners.

beings are ipso facto persons, [2] and in view of the centrality of this point to the resolution of the case at bar, this Court should issue a strong reaffirmation of the principle that human beings are persons regardless of any disabilities they may bear.

A. Every Human Being Is Conclusively Presumed to Be a "Person" Under the Fourteenth Amendment.

The fourteenth amendment to the Constitution of the United States provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. This amendment secures protection for the basic, minimum human rights any state must respect. It is imperative that categories of human beings not be read out of the terms of this amendment.

The Constitution is not a legislative code designed to specify its application in every conceivable situation. "We do not expect to find in a constitution minute details. It is necessarily brief and comprehensive. It prescribes outlines, leaving the filling up to be deduced from the outlines." *Legal Tender Cases,* 79 U.S. (12 Wall.) 457, 532 (1870). Thus, the vitality of constitutional principles depends upon their being presumed to apply. "A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance." *Boyd v. United States,* 116 U.S. 616, 635 (1886).

If there were ever a term whose scope must be broadly construed, it is the term "person." For whoever is not a person lacks not only the privileges of citizenship, but even the barest minimum of human rights. A person need not have every right — prisoners, minors, and aliens, for example, do not possess the full panoply of rights and privileges afforded under the Constitution — but a non-person has *no* rights whatsoever. A non-person is no better off than property, entirely subject to the whim of his or her caretaker and whatever permissible regulation the state may deign to impose.

[2] *See, e.g.,* Thomas, *Potential for Personhood: A Measure of Life,* 2 Bioethics Q. 164, 179-80 (1980) (suggesting that "biological life" may not "suffice to establish personhood" under the Constitution and that "sentience of self" may be necessary).

The constitutional protection for "persons" simply cannot function if each individual or class of human beings must prove inclusion in the roll of "persons." Does the term "person" include retarded individuals? There is not likely much, if any, explicit support for that particular proposition in the text, history, or early application of the fourteenth amendment. Yet these are certainly persons. *E.g., City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985) (overturning exclusionary zoning law on basis of equal protection rights of retarded persons). Does "person" include citizens of hostile nations? Children under the age of eighteen? Convicted misdemeanants or felons? Mentally ill individuals? Each of these classes of human beings lacks either the legal or physical ability to exercise certain rights, yet each is unquestionably a class of persons. This is so, not because members of each class can *prove* their inclusion under the fourteenth amendment, but because they are *conclusively presumed* included. "They are humans, live, and have their being." *Levy v. Louisiana*, 391 U.S. 68, 70 (1968) (discussing children born out of wedlock). Therefore, "[t]hey are clearly 'persons' within the meaning of the Equal Protection Clause of the Fourteenth Amendment." *Id.*

Human beings diagnosed as suffering from permanent mental disability are likewise "humans, live, and have their being." They do not need to overcome any additional hurdles in order to establish their right to inclusion within the term "person" as used in the fourteenth amendment.

B. The Framers of the Fourteenth Amendment Did Not Distinguish Between "Human Beings" and "Persons."

If one thing is overwhelmingly clear from the record of the debates leading up to and surrounding passage of the thirteenth and fourteenth amendments and the post-war civil rights legislation, it is that the framers of these documents considered personhood and biological humanity to be interchangeable terms.

Representative James S. Brown, for example, explicitly denied the notion that personhood required something more than human life.

> [D]oes the term "person" carry with it anything further than a simple allusion to the *existence* of the individual? It certainly cannot be strained into any recognition of slavery, since the very recognition of personality excludes [an institution which] does not regard its victims as persons but as chattels.

Cong. Globe, 38th Cong., 1st Sess. 1753 (1864) (emphasis added).

Likewise Representative John A. Bingham, author of section one of the fourteenth amendment, declared in reference to the fifth amendment the principle he viewed as fundamental:

> [T]he Constitution of the United States . . . declared that "no person shall be deprived of life, liberty, or property without due process of law." By that great law of ours it is not inquired whether a man is "free" by the laws of England; it is only to be inquired *is he a man*, and therefore free by the law of that creative energy which breathed into his nostrils the breath of life, and he became a living soul, endowed with the rights of life and liberty. . . . Before that great law *the only question to be asked of a creature claiming its protection is this: Is he a man?* Every man is entitled to the protection of American law, because its divine spirit of equality declares that all men are created equal.

Cong. Globe, 40th Cong., 1st Sess. 542 (1867) (emphasis added).

Indeed, examples are legion to demonstrate the basic assumption of the framers and their contemporaries that "in the eyes of the Constitution, every *human being* within its sphere . . . from the President to the slave, is a *person*." Cong. Globe, 37th Cong., 2d Sess. 1449 (1862) (Sen. Sumner) (first emphasis added).[3]

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[3] *E.g.*, Cong. Globe, 39th Cong., 1st Sess. 74 (1865) (Rep. Stevens) ("Accidental circumstances, natural and acquired endowment and ability, will vary their fortunes. But equal rights to all the privileges of Government is *innate in every immortal being*, no matter what the shape or color of the tabernacle which it inhabits") (emphasis added); *id.* at 77 (1866) (Sen. Trumbull) ("any legislation or any public sentiment which deprives *any human being* in the land of those great rights of liberty will be in defiance of the constitution") (emphasis added); *id.* at 322-23 (1866) (Sen. Trumbull) ("great object of securing to *every human being* within the jurisdiction of the Republic equal rights before the law") (emphasis added); *id.* at 1159 (1866) (Rep. Windom) (rights to life, liberty, and pursuit of happiness are "rights of

(cont'd on next page)

There is, therefore, no historical warrant for the conclusion that any human beings might be excluded from the class of persons protected under the fourteenth amendment. As forcefully stated by Representative Joshua R. Giddings,

> Our fathers, recognizing God as the author of human life, proclaimed it a "self-evident" truth that every human being holds from the Creator an inalienable right to live . . . .
>
> . . . If this right be denied, no other can be acknowledged. If there be exceptions to this central, this universal proposition, that *all men,* without respect to complexion *or condition,* hold from the Creator the right to live, who shall determine what portion of the community shall be slain? And who may perpetrate the murders?

Cong. Globe, 35th Cong., 1st Sess. App. 65-66 (1858) (second emphasis added).

C. The Inseparable Union of Humanity and Personhood is Fundamental to the Unique Value of Human Life.

Every human being is a person. To hold otherwise is to deny the unique value of human life, and thus to overthrow one of the foundational principles of society.

The law must recognize a difference in kind between human beings and animals or plants. This difference reflects the inherent dignity of man. This difference is the difference of personhood.

Not every person has *every* right. But no one except a person has *any* rights. The issue is not whether those persons who are permanently unconscious should receive the full range of the rights of citizenship, such as the right to vote, but whether they may lay claim to the barest minimum of human rights: "the right to *exist,*" Cong. Globe, 39th Cong., 1st Sess. 1159 (1866) (Rep. Windom) (emphasis added).

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human nature," and the most basic "right of human nature [is] the *right to exist")* (emphasis added); *id.* at 1151 (1866)(Rep. Thayer) ("relief of human nature" secured in thirteenth amendment); 3 Cong. Rec. 1794 (1875) (Senator Allen G. Thurman) (may not deny equal protection to "any person" in the jurisdiction, "*be he sane or be he insane,* be he old or be he young, be he innocent or be he criminal, be he learned or be he ignorant") (emphasis added).

The petitioners' claim in the present case would deny even this most basic right, for petitioners seek the authority to put Nancy Cruzan, an innocent human being, to death by starvation and dehydration. No such authority exists under our Constitution: society "must treat its members with respect for their intrinsic worth as human beings," for "if the deliberate extinguishment of human life has any effect at all, it more likely tends to lower our respect for life and brutalize our values." *Furman v. Georgia,* 408 U.S. 238, 303 (1972) (Brennan, J., concurring) (overturning Georgia death penalty). If this observation holds true with regard to the life of a convicted felon, it is much more so for an innocent victim of mental disability.

Justice Harlan, dissenting in *Poe v. Ullman,* 367 U.S. 497 (1961), emphasized the central role of tradition and history in the interpretation of the Constitution. "A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound." *Id.* at 542 (Harlan, J., dissenting).

The notion that some gravely disabled individuals need not be treated as persons under the Constitution represents a radical departure from the history, indeed the founding principles, of this nation. This notion is deeply offensive to what "seems to us to be an obvious truth," *Gideon v. Wainwright,* 372 U.S. 335, 344 (1963): "We hold these truths to be self-evident: that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty, and the pursuit of Happiness." The Declaration of Independence para. 2 (U.S. 1776).

The fourteenth amendment was adopted to secure basic human rights "not only for the sake of . . . the unfortunate human beings for whose special relief it [was] designed," but "for the purpose as well of giving a new assurance . . . that no man shall ever, in the coming future, as long as the Republic stands . . . be deprived of his life, of his liberty, or his property without due process of law." Cong. Globe, 37th Cong., 2d Sess. 1640 (1862) (Rep. Bingham). As this Court explained in *West Virginia Board of Education v. Barnette,* 319 U.S. 624, 638 (1943), the "very purpose" of a constitutional declaration of rights

> was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of

majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life . . . and other fundamental rights may not be submitted to a vote; they depend on the outcome of no elections.

This Court must firmly uphold the fundamental principle that all human beings, regardless of age, disability, poor health, or condition of dependency, are persons entitled to the right to life and equal protection guaranteed under the United States Constitution.

II. PETITIONERS' CLAIM OF A RIGHT TO STARVE AND DEHYDRATE NANCY CRUZAN TO DEATH IS WHOLLY INCOMPATIBLE WITH HER GENUINE RIGHTS, AS A PERSON, TO LIFE, LIBERTY, AND THE EQUAL PROTECTION OF LAW.

As a person, Nancy Cruzan has certain fundamental human rights secured under the Constitution — rights to life, liberty, and equal protection. Petitioners, however, would have this Court sweep away these genuine rights of Nancy Cruzan in order to establish a new constitutional "right" of guardians to starve and dehydrate to death their incompetent wards. This perverse claim must fail.

A. Life: Petitioners' Claim Is Tantamount to Assertion of a Right to Kill Nancy Cruzan.

Nancy Cruzan has a right to life secured under the fifth and fourteenth amendments to the Constitution. Petitioners' claim is diametrically opposed to this fundamental human right.

In fact, petitioners' claim is tantamount to the assertion of a right to kill Nancy Cruzan.

As the Supreme Court of Missouri noted, euphemisms abound in the case at bar. *Cruzan v. Harmon,* 760 S.W.2d 408, 412 (Mo. 1988) (en banc). It is crucial, therefore, to focus on a basic reality: petitioners object to Nancy's food and fluids *because they keep her alive.*

Thus, this case is not about anyone's autonomy or the right to refuse treatment. Rather, this case is about whether guardians have a constitutional right to choose death, by starvation and dehydration, for their incompetent ward.

This claim, of course, conflicts with the fundamental right to life.

First, the explicit constitutional right to life set forth in the fifth and fourteenth amendments negates any inference of an unwritten fundamental right to choose death for oneself [4] or another. This Court has cautioned against "expand[ing] the substantive reach of [the due process clauses], particularly if it requires redefining the category of rights deemed fundamental." *Bowers v. Hardwick,* 478 U.S. 186, 195 (1986). Such expansion would be most unwarranted when the novel "right" would undercut an explicit, existing constitutional safeguard. [5] Thus, petitioners may not assert an unwritten right to choose death for Nancy Cruzan.

Second, the right to life specifically forbids state deprivation of life "without due process of law." U.S. Const. amend. XIV, § 1. A state facility, therefore, as a state actor, may not deprive an innocent [6] person of necessary food and water, especially when simple, routine, nonburdensome methods of feeding are available, as in the present case. Withholding of adequate food and fluids would deprive Nancy Cruzan of life as surely as would a lethal injection.

Third, when the state acts as caretaker for a person — here, Nancy Cruzan resides in a state facility — the state has an affirmative duty to "provide for his basic human needs — e.g., *food,* clothing, shelter, medical care, and reasonable safety," *DeShaney v. Winnebago*

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[4] *See also* Marzen, O'Dowd, Crone & Balch, *Suicide: A Constitutional Right?,* 24 Duq. L. Rev. 1 (1985) (there is no constitutional right to kill oneself); *cf.* Weber, *What Right to Die?,* 18 Suicide & Life Threatening Behav. 181 (1988) (discussing ramifications of recognizing a constitutional "right to die").

[5] Thus, for example, the explicit right to property negates any inference of a "right" to steal, and the explicit right to free speech negates any inference of a "right" to suppress unpleasant speech.

[6] Nor could the state deny necessary food and water to a convicted offender. Infliction of such torture would constitute cruel and unusual punishment. *Estelle v. Gamble,* 429 U.S. 97, 102-03 (1976) (infliction, by failure to address prisoner's medical needs, of physical "torture or lingering death," would violate primary concern of drafters of Eighth Amendment). *Cf. In re Caulk,* 125 N.H. 206, 480 A.2d 93 (1984) (prisoner has no right to fast to death); *State ex rel. White v. Narick,* 292 S.E.2d 54 (W. Va. 1982) (same).

County Dep't of Social Servs., 109 S. Ct. 998, 1005 (1989) (emphasis added); *Youngberg v. Romeo*, 457 U.S. 307 (1982). In such situations, the person in custody is dependent upon the state for the necessities of life; therefore, failure to provide these necessities is equivalent to active deprivation of the person's life.

Fourth, the individual's right to life gives rise to an unqualified and compelling state interest in protecting life. The right to life does not depend upon a person's condition or prognosis; rather, this right is uniformly fundamental. Likewise, the state's interest in safeguarding this right is not limited by any notions of the utility of the person to the state. Each person possesses an intrinsic and inalienable right to life that is completely independent of any supposed "usefulness" of that person. As the court below held, "we may not arbitrarily discount" the state's interest in protecting the life of each person. 760 S.W.2d at 422. To do so would be to create a judicial scale of relative importance for the lives of different people, and thus to deny the inherent and unqualified value, in the eyes of the law, of *all* people.

B. Liberty: Petitioners' Claim Is Tantamount to Assertion of a Right to Usurp Nancy Cruzan's Personal Rights.

Petitioners claim the authority to assert alleged personal rights of autonomy on behalf of Nancy Cruzan. This authority, however, would violate the integrity of any such rights.

Petitioners rely heavily upon the supposed federal constitutional autonomy right of Nancy Cruzan to refuse necessary food and fluids. But Nancy Cruzan is incompetent; by definition, she is unable to make any personal choices. Hence, autonomy concerns simply do not apply to this case. "If a third party, no matter how well-intentioned, makes a choice for that individual, the choice can no longer be called autonomous." Ikuta, *Dying at the Right Time: A Critical Legal Theory Approach to Timing-of-Death Issues*, 5 Issues L. & Med. 3, 42 (1989).

Petitioners' claim is in reality an attempt to assume for themselves the power to exercise virtually unreviewable decisionmaking authority over Nancy Cruzan. *See* Brief for Petitioners at 39 ("The state should not be involved *at all* in such private decisionmaking . . .") (emphasis added). Under such circumstances, "[i]f any

right is vindicated, it is the right of the caretaker to choose death for the incompetent [person]." Weber, *Substituted Judgment Doctrine: A Critical Analysis*, 1 Issues L. & Med. 131, 149 (1985).

Fidelity to the liberty of an incompetent person requires respecting that person's inability to decide.

> The law must often adjust the manner in which it affords rights to those whose status renders them unable to exercise choice freely and rationally. Children, the insane, and those who are irreversibly ill with loss of brain function, for instance, all retain "rights," to be sure, but often such rights are only meaningful as they are exercised by agents acting with the *best interests* of their principals in mind. . . . It is in this way that paternalism bears a beneficent face, paternalism in the sense of a caring, nurturing parent making decisions on behalf of a child who is not quite ready to take on the full rational and considered task of shaping his or her own life. . . . *[W]e act in their interest by restricting certain choices* . . . .

Thompson v. Oklahoma, 108 S. Ct. 2687, 2693 n.23 (1988) (plurality opinion) (emphasis added). To pretend that the actions of a third party are those of the incompetent person is to treat the incompetent person as a puppet whom others may manipulate.

Freedom to choose presupposes "a fully rational, choosing agent," *id.*; *see Schloendorff v. Society of New York Hosp.*, 211 N.Y. 125, 129-30, 105 N.E.2d 92, 93 (1914) ("Every human being of adult years *and sound mind* has a right to determine what shall be done with his body") (emphasis added); *Natanson v. Kline*, 186 Kan. 393, ___, 350 P.2d 1093, 1104 ("each man . . . may, *if he be of sound mind*, expressly prohibit the performance of life-saving surgery") (emphasis added), *clarified*, 187 Kan. 186, 354 P.2d 670 (1960). In the absence of sufficient mental capacity, a person is entitled to have others act on his behalf subject to an objective standard, i.e., in the "best interests" of that person. *Thompson*, 108 S. Ct. at 2693 n.23; *Parham v. J.R.*, 442 U.S. 584, 616 (1979). Guardians, even parents, simply do not have a constitutional license to exercise "absolute and unreviewable discretion to decide" the fate of their wards. *Parham*, 442 U.S. at 604.

Freedom to choose includes the freedom *not* to choose, and the freedom *not* to have others usurp one's personal decisionmaking power. Granting petitioners power to assert subjective and discretionary authority over Nancy Cruzan would demean her right to liberty, not enhance it.

C. Equal Protection: Petitioners' Claim is Tantamount to Assertion of a Right to Discriminate Against Nancy Cruzan on the Basis of Her Disability.

Petitioners' claim conflicts with the right of Nancy Cruzan to the equal protection of law. Ruling for petitioners necessarily would entail either judicial creation of a category of people "better off dead," or judicial sanction of lethal discrimination on the basis of handicap.

Removal of Nancy Cruzan's food and fluids will cause her death by starvation and dehydration. Petitioners seek this end because, in their opinion, Nancy Cruzan lacks the "potential for meaningful life," Brief for Petitioners at 39 n.24; *id.* at 16. In short, because of Nancy Cruzan's severe mental disability, petitioners want her dead.

Petitioners do not deny that their desire to have Nancy Cruzan starve to death reflects a negative evaluation of her "quality of life." *Id.* at 37-38. In fact, petitioners offer no other basis whatsoever for limiting the "right" of guardians to choose death, by starvation, dehydration, or other deliberate neglect, for their wards. Petitioners argue that *all* persons have a right to refuse medical treatment (and, by unargued and unspoken extrapolation, a right to refuse necessary food and water), *id.* at 17, and that the rights of *all* incompetent persons are assignable to third party decisionmakers, *id.* at 22. The only limitation petitioners propose, for what would otherwise be an absolute and unreviewable power of guardians fatally to neglect their wards, is that the decision to choose death for the ward must be "reasoned." *Id.* at 39. A decision is "reasoned," claim petitioners, if the incompetent person has "[n]o . . . potential for meaningful life." *Id.* at 39 n.24.

Implementation of this undefined "meaningful life" criterion [7] would deny equal protection to helpless and dependent incompetent

[7] The apparent alternative — completely unreviewable discretion for guardians to choose death, by neglect, for their wards — is presumably unacceptable even to petitioners.

persons.

If, on the one hand, this Court were itself to determine what constitutes "meaningful life" for human beings, the result would be explicit judicial assessment of the "quality of life" of handicapped persons. Adjudication of which human beings are "fit to die," however, is completely antithetical to the concept of equal protection of law. [8]

If, on the other hand, this Court were to sanction deference to the "quality of life" judgments of the incompetent person's caretakers, this Court would be conferring federal constitutional approval upon invidious discrimination on the basis of disability. This would also violate the equal protection clause: "The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti,* 466 U.S. 429, 433 (1984).

It is doubtless true that caretakers and medical providers at times deny necessary care — even food and water — to incompetent persons on the basis of a private judgment that these persons would be "better off dead." Destro, *Quality-of-Life Ethics and Constitutional Jurisprudence: The Demise of Natural Rights and Equal Protection for the Disabled and Incompetent,* 2 J. Contemp. Health L. & Pol'y 71, 98 (1986). This Court, however, may neither grant approval to such invidious practices nor attempt itself to define the "proper" criteria for "quality of life" judgments.

If Nancy Cruzan were a normal infant suffering from blockage in her esophagus, no one would suggest depriving her of necessary food and fluids provided by means of a tube to her stomach. If Nancy Cruzan possessed a realistic possibility of recovery to a normal mental capacity, [9] no one would seek a court order to assure her

[8] Petitioners apparently concede as much. Brief for Petitioners at 37, 40.

[9] Nancy Cruzan may yet retain the possibility of cognitive recovery. From the badly mistaken determination that Karen Ann Quinlan would die without a respirator, to the recent erroneous judgment that 86-year-old Carrie Coons was in a permanent "vegetative" state, *see* Steinbock, *Recovery from a Persistent Vegetative State?: The Case of Carrie Coons,* 19 Hastings Center Rep. 14 (July/Aug. 1989), medical experts have repeatedly failed to demonstrate any capacity for foolproof prognostication.

prompt demise by starvation and dehydration. But because petitioners have given up hope of her recovery *from her mental disability,* petitioners would deny Nancy Cruzan food and fluids admittedly necessary and effective to maintain her life. This is patent and invidious discrimination on the basis of handicap.[10]

CONCLUSION

Petitioners' claim of authority to starve and dehydrate Nancy Cruzan runs directly contrary to the principle that every human being is a person possessing fundamental rights to life, liberty, and equal protection. This Court should reaffirm that fundamental principle, reject the claim of petitioners, and affirm the judgment of the Supreme Court of Missouri.

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[10] Section 504 of the Rehabilitation Act of 1973 also prohibits discrimination, in a federal program, on the basis of handicap. 29 U.S.C. § 794 (1982). The discrimination at issue here would run afoul of this federal statute. *See Bowen v. American Hosp. Ass'n,* 476 U.S. 619, 655 (1986) (White, J., dissenting) (giving as example of discrimination the denial, on the basis of an infant's mental disability, of procedures necessary for the administration of food and fluids).